No. 96-330

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The filing of four briefs opposing certiorari, totalling 83 pages, does not diminish the considerations favoring review in this case. The vigor with which respondents defend the Sixth Circuit's decision proves that jurisdiction is hardly a dead issue. Nor have respondents shown that the case lacks public importance. The parties directly affected number in the thousands, and the scope of bankruptcy jurisdiction is critical to thousands more who are or will be involved in mass tort litigation across the country. The decision is a major development -- the first time a nondebtor mass tort manufacturer defendant has come this close to shutting down litigation against it on the basis that it might someday bring contribution claims against an unrelated corporate co-defendant in chapter 11. There is no warrant for supposing that Congress intended such a result.

1. The Sixth Circuit's Jurisdictional Ruling Presents a Justiciable Controversy

The suggestion that the jurisdictional question presented herein is or may become moot is plainly groundless. Respondents' efforts to resist and overturn the district court's abstention decision are based on the vitality of that jurisdictional ruling; if no federal court jurisdiction existed over the nondebtor claims, it is rather the abstention issues that would be moot. Regardless of how abstention is decided, however, the jurisdiction ruling, if not addressed in this Court, will remain the law of the case and a significant precedent.

A few examples suffice to demonstrate the real and immediate effects of the Sixth Circuit's jurisdiction ruling. In a brief filed in the district court in support of a motion to enlarge their time to file notices of removal, the three non-shareholder nondebtors (3M, Baxter, and Bristol-Myers) argued that the jurisdiction ruling permits them to continue

removing cases to various federal courts regardless of the district court's abstention ruling. Dow Chemical similarly has argued to Judge Pointer that, in view of the jurisdiction ruling, the district court's July 30 abstention ruling does not require the MDL court to remand nondebtor cases to state court. Even if the Sixth Circuit affirms the July 30 abstention decision, there is no reason to conclude that the nondebtor defendants will cease their efforts to keep cases in federal court on the basis of the jurisdiction decision.

The existence of "related to" jurisdiction therefore is still a "live" controversy in which petitioner has a "legally cognizable interest." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Even if, contrary to all indications, affirmance of the abstention ruling caused respondents to abandon their attempts to remove tort claims, the jurisdiction ruling would still govern subsequent proceedings, including any later attempts to revisit abstention or otherwise effect removals of nondebtor claims. A decision with such ongoing effect is surely not moot. *See, e.g., Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 568 (1984); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 177-79 (1968).

Nor is there any question of "ripeness" here. As noted above, respondents are already seeking relief in different courts on the basis of the jurisdiction ruling, even before the Sixth Circuit rules on the abstention appeals.

Finally, respondents' admission (*e.g.*, 3M Br. 9) that 28 U.S.C. § 1254(1) provides this Court with jurisdiction to grant the petition itself contradicts the justiciability argument. There is no finality threshold for this Court's jurisdiction; if the case was properly in the Court of Appeals, this Court may grant certiorari. *See* Robert L. Stern, Eugene

Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 2.2, at 40 (7th ed. 1993). The Court has frequently reviewed significant non-final decisions involving federal jurisdiction and procedure, particularly where the issue presented was key to the further conduct of the litigation. *See, e.g., Board of Pardons v. Allen*, 482 U.S. 369, 372 (1987) (due process); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 684-85 (1949) (jurisdiction); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 503 (1947) (*forum non conveniens*); *Hickman v. Taylor*, 329 U.S. 495, 499 (1947) (discovery).

2. The Unprecedented Expansion of Bankruptcy Jurisdiction Represented by the Sixth Circuit's Decision Warrants Review by This Court

Respondents characterize the Sixth Circuit's decision as moderate and unremarkable. Their chief ground for this assertion is the court's facial adherence to the predominant "conceivable impact" test. But as demonstrated (Pet. 13-18), this formulation is an oversimplification and distortion of *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and its progeny. Investing the word "conceivable" with talismanic and limitless significance, respondents largely ignore *Lindsey*'s central conflict with the actual *holding* of *Pacor*: that the mere possibility of a subsequent contribution claim by a nondebtor defendant arising out of alleged common liability with the debtor does not, without more, confer "related to" jurisdiction. It is that conflict that squarely presents the principal ground petitioner urges for granting the writ here.

Respondents' attempts to harmonize *Pacor* and *Lindsey* are unavailing. If a single contingent contribution claim does not give rise to "related to" jurisdiction, the mere assertion

that many such claims may be made does not create such jurisdiction. Nor is it significant (3M Br. 16) that the debtor in *Pacor* had not been sued by the original plaintiff. An estate's potential contribution liability depends not upon whether the original plaintiff has sued the debtor, but on whether the debtor is in fact jointly liable to that plaintiff and thus subject to a contribution claim if a nondebtor defendant discharges greater than its share of the joint liability. The Debtor's joint liability here for providing silicone gel to be included in a co-defendant's product (or providing a separate implant to the same plaintiff) is conceptually identical to liability for supplying asbestos for a co-defendant's product.[1]

Respondents also seek to distinguish *In re Fedpak Sys., Inc.*, 80 F.3d 207 (7th Cir. 1996), on the ground that the frozen dessert machine at issue in that case was no longer property of the estate. *E.g.*, 3M Br. 17-18. But the issue in *Fedpak* was the potential for claims against the estate -- and the court properly denied "related to" jurisdiction because it found that prospect speculative. *Fedpak* embodies the balanced approach to "related to" jurisdiction that *Pacor* originated, this Court endorsed in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), and the Sixth Circuit has eschewed.

Respondents cite other cases applying *Pacor* to find "related to" jurisdiction in various circumstances. But none of these cases finds jurisdiction in the situation common to *Pacor* and this case -- an independent corporate tortfeasor with a potential contribution claim -- and none begins to

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1 3M's repeated insistence that the claims against it and Dow Corning are the "same claim" (Br. 25) also lacks significance. In a sense, all joint tortfeasors are subject to the "same claim" -- but the common rule is that claims against joint tortfeasors proceed even if a co-defendant has entered chapter 11. *See* Pet. 16.

dissipate the conflict petitioner urges. Many of the cases cited by respondents concerned parties entitled to automatic contractual indemnification. *See, e.g., In re G.S.F. Corp.*, 938 F.2d 1467 (1st Cir. 1991); *Home Ins. Co. v. Cooper & Cooper, Ltd.*, 889 F.2d 746 (7th Cir. 1989).[2] Other cases, while reciting the *Pacor* standard, are of little relevance here because they involved construction of orders directly affecting property of the estate. *See, e.g., Publicker Indus., Inc. v. United States (In re Cuyahoga Equip. Corp.)*, 980 F.2d 110 (2d Cir. 1992); *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261 (3d Cir. 1991).

While some cases have given extremely broad application to *Pacor*, most notably *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987), which essentially found "related to" jurisdiction over all claims involving joint tortfeasors, that is precisely what justifies this Court's involvement. The broadest readings of *Pacor*, imputing a literal and unnuanced meaning to "conceivable impact," are unsupported by any suggestion that Congress intended such a sweep for § 1334(b). The result sought here -- mass

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[2] *Celotex* is in this category. There, permitting a creditor to execute on a surety bond securing a judgment against the debtor would, unlike the tort claims at issue here, have had a direct effect on the debtor because it would have entitled the surety to go after collateral securing the bond. The chain of contingent events discussed in *Celotex* and stressed by respondents (*e.g.*, Dow Br. 11) related to the potential *degree* of impact on the estate -- the fact of *some* impact was beyond dispute.

halting and transfer of litigation involving unrelated joint tortfeasors -- shows that correction of this drift is warranted.[3]

3. Respondents' Arguments About the Supposed Need for Transfer are Misleading and Irrelevant

Respondents suggest (*e.g.*, 3M Br. 23-24; Bristol-Myers Br. 16) that consolidation of the nondebtor tort claims in the bankruptcy forum is necessary to the resolution of the Debtor's bankruptcy. Respondents are vague, however, about the actual practical reasons for consolidation. While Dow seeks a "joint trial" on disease causation, no nondebtor has sought to be included in any joint causation trial proposed as part of the estimation process.

The suggestion that transfer is somehow necessary either to conduct estimation proceedings or to facilitate a settlement is baseless. It is undisputed that estimation and establishment of a claims facility occurred in the A.H. Robins bankruptcy without a single claim ever being transferred.[4] Thus, 3M's

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[3] Respondents suggest (*e.g.*, Baxter Br. 17-18) that the Sixth Circuit's virtually limitless construction of "related to" jurisdiction is not troubling because Congress provided a powerful abstention provision to avoid overbroad applications of jurisdiction. But respondents fail to inform the Court that they have argued in the Sixth Circuit that the jurisdictional ruling essentially forecloses the district court from applying either mandatory or discretionary abstention to the nondebtor breast implant claims and requires it to order all such claims centralized in the bankruptcy forum.

[4] Petitioner did not, as Dow alleges (Br. 18 n.8), claim that no transfer was ever *ordered* in *Robins*. However, the transfer initially ordered by the district judge was never *effected* because the notice required by the Fourth Circuit was never given to individual plaintiffs. The absence of such transfer did not impede resolution of the bankruptcy. *See* Pet. 21.

argument that transfer is necessary to "deal[ ] with" its potential contribution claims (Br. 23) is groundless. 3M can participate in the estimation proceedings as a contingent creditor. The Debtor will surely deal with any genuine contingencies. Claims against nondebtors need not be transferred, much less liquidated, for the bankruptcy court to estimate the Debtor's exposure to any party.[5]

Moreover, respondents fail to explain how any appreciable number of contribution claims will even find their way into the bankruptcy. While respondents are apparently prepared to submit proofs of claim preserving their theoretical rights as of the bar date, that is a far cry from being willing ultimately to prove in any court that breast implants cause harm -- a necessary element of any contribution claim. *See* Pet. 18.

Even if the nondebtor defendants were willing to make such allegations, contribution claims would not play a major role in the bankruptcy. Most claims resolved in the ordinary course prior to the conclusion of the bankruptcy will settle rather than go to trial, generally barring a contribution claim against non-settling tortfeasors. *See In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 893 (E. & S.D.N.Y. 1991) (42 states bar contribution claims by settling tortfeasors). Only where a nondebtor defendant is held jointly and severally liable after a trial and a plaintiff collects damages

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[5] Indeed, if estimation is properly conducted, contribution claims are a wash: The question in the estimation will be the Debtor's total liability to all tort plaintiffs. A contribution claim will mature only if part of that liability is discharged by another defendant, shifting the claim from the original plaintiff to the party seeking contribution. The contribution claim does not constitute a separate source of liability for the Debtor.

from that nondebtor attributable to the Debtor's fault would a contribution claim become non-contingent. Few such claims are likely to ripen during the bankruptcy -- and those that remain contingent *must be disallowed* under the express terms of Bankruptcy Code § 502(e)(1)(B). *See, e.g., In re Pacor, Inc.*, 110 B.R. 686, 689-91 (E.D. Pa. 1990); *In re Amatex Corp.*, 110 B.R. 168, 170-73 (Bankr. E.D. Pa. 1990). That presumably is why the Debtor has shown no interest in having claims against 3M, Baxter, and Bristol-Myers transferred to be "dealt with" in the bankruptcy.

4. Section 157(b)(5) Was Never Intended to Effect Mass Transfer of Nondebtor Litigation

Respondents suggest that since § 157(b)(5) does not repeat the language in § 157(b)(2) referring to personal injury claims "against the estate," it must, by logical implication, have been intended to empower the district court to transfer all personal injury claims against any defendant. But if Congress had meant to create such a sweeping and novel power over nondebtor litigation, it would likely have done so expressly and not by negative implication in a statute otherwise devoted to dividing up business within the bankruptcy between the district and bankruptcy courts.[6]

Respondents' central argument for their broad reading of § 157(b)(5) is the supposed Congressional policy mandating

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[6] Contrary to Dow's suggestion (Br. 17 n.7), *Brenes v. United States Lines, Inc. (In re United States Lines, Inc.)*, 128 B.R. 339, 341 (S.D.N.Y. 1991), does observe that § 157(b)(5) is mainly concerned with "which court, as between the bankruptcy court and the district court, should hear personal injury claims against the debtor." This point is pertinent whether or not the district court has power to remove cases from state court -- an issue that has nothing to do with the application of § 157 to claims against nondebtors.

total centralization of all conceivably "related to" litigation in the bankruptcy forum. While the Sixth Circuit claims to have located such a policy, Congress has never expressed it. The Circuit relied for this point on two cases -- *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), which as noted (Pet. 21-22) focused its analysis almost entirely on claims against the debtor and in any event involved only a single product and manufacturer, and *Murray v. Pan Am. World Airways, Inc. (In re Pan Am. Corp.)*, 16 F.3d 513 (2d Cir. 1994), which itself concerned only claims against Pan Am and its affiliates.

The legislative history underlying *Robins* and *Pan Am.* does not reflect that Congress gave any consideration to nondebtor claims in expressing a policy towards centralization of bankruptcy proceedings. For example, Rep. Robert Kastenmeier's oft-quoted statement that the purpose of § 157 was to avoid "creating a multiplicity of forums for adjudication of parts of a bankruptcy case" actually had nothing to do with transferring claims against nondebtors:

> The House-passed bill contained a definition of what a bankruptcy judge could properly do. The Senate bill adopted a largely similar view with one exception. Under the Senate-passed bill, bankruptcy judges could not hear unliquidated claims. The Senate approach would have repudiated decades of bankruptcy law and practice. The change in the definition in the Senate-passed bill would have contradicted the basic purposes of the consolidated jurisdiction we adopted in 1978 in response to the recommendations of the Commission on Bankruptcy Laws. Finally, it would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case.

130 Cong. Rec. H7492 (daily ed. June 29, 1984) (citation omitted), *reprinted in* 4 *Collier on Bankruptcy* (Appendix) XX-18 through XX-19 (15th ed. 1996).

In context, it is clear that Rep. Kastenmeier was concerned only about preserving centralized liquidation of *claims against the estate*. With due respect to the courts that have assigned the language broader meaning, it hardly establishes that this venue-setting provision was intended to create broad new powers to transfer *nondebtor* cases. It thus appears that the Sixth Circuit has magnified and broadened the tendency in some courts to read into § 157(b)(5) a power never intended by Congress, a sound reason for review by this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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